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Group, Inc., CXO Media, Inc. and Steve Ragan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RIVER CITY MEDIA, LLC, a Wyoming
limited liability company, MARK
FERRIS, an individual, MATT FERRIS,
an individual, and AMBER PAUL, an
individual,

Plaintiffs,

vs.

No. 2:17-cv-105-SAB

DEFENDANTS CXO MEDIA, INC.'S
REPLY TO RIVER CITY MEDIA, LLC'S
OPPOSITION TO CXO MEDIA, INC.'S
MOTION FOR PROTECTIVE ORDER

Hearing Date: February 5, 2018 @ 6:30 pm
Without Oral Argument

DEFENDANT CXO MEDIA, INC.'S REPLY TO
RIVER CITY MEDIA, LLC'S OPPOSITION TO CXO
MEDIA, INC.'S MOTION FOR PROTECTIVE ORDER
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1 KROMTECH ALLIANCE
 2 CORPORATION, a German corporation,
 3 CHRIS VICKERY, an individual, CXO
 4 MEDIA, INC., a Massachusetts
 5 corporation, INTERNATIONAL DATA
 6 GROUP, INC., a Massachusetts
 7 corporation, and STEVE RAGAN, an
 8 individual, and DOES 1-50,

9 Defendants.

10 Defendant CXO Media, Inc. ("CXO") respectfully submits this Reply to Plaintiff
 11 River City Media, LLC ("RCM") Opposition (ECF No. 73) ("Opposition") to CXO's
 12 Motion for Protective Order (ECF No. 69) ("Motion") as follows:

13 Introduction

14 Plaintiff RCM presents no evidentiary support in its opposition to CXO's Motion,
 15 other than a declaration from Leeor Neta, counsel for RCM, stating (without specifying a
 16 single example) that some of the information sought by RCM, which CXO seeks to
 17 protect as highly confidential, was allegedly found on the internet. RCM's silence on
 18 what was allegedly found on the internet speaks volumes. RCM gives no example
 19 because it cannot find on the internet the specific information that CXO treats as highly
 20 confidential and which it seeks to protect, such as revenue per article for the article at
 21 issue, number of views for the article, location of viewers, and highly confidential
 22 corporate data. Again, CXO is not seeking to prevent Plaintiffs from learning this

1 information; it is only seeking a protective order that governs how Plaintiffs may use and
 2 distribute this information. This protection is particularly warranted since Plaintiffs are
 3 prone to spewing information across email and text messages (including illegally as
 4 discussed by the Sixth Circuit and referenced in the Motion¹). Plaintiffs' troubled history
 5 and disrespect for the rights of others, together with CXO's interest in its highly
 6 confidential, commercially-sensitive and proprietary information, make a protective order
 7 necessary.
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10 Argument

11 **A. Plaintiffs Have Not Rebutted the Proof Offered by CXO Regarding** 12 **Confidentiality or Harm to CXO from Allowing Plaintiffs (World-Renowned** 13 **Spam Artists) to Spew CXO's Confidential Information.**

14 Plaintiffs state that CXO "submits only one self-serving, conclusory declaration in
 15 support of the 'confidentiality' of the documents related to the amount of revenue the
 16 CXO brands) or propert(ies) generate; the number of views or daily unique visitors with
 17 IP addresses located within the state of Washington; and the number of paid subscriptions
 18 sent to any address in the state of Washington." Opposition at 3-4. Plaintiffs then state
 19 that they "have been able to locate some of this information simply by searching the
 20 internet" and cite their attorney's declaration. *Id.* at 4. But a quick look at their
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24 ¹ See Motion (ECF No. 69) at 6-7.

1 attorney's declaration indicates that it does not specify *any* information that was found on
2 the internet, much less the number of views or daily unique visitors with IP addresses
3 located within the state of Washington, or the number of paid subscriptions sent to any
4 address in the state of Washington. *See* Neta Decl. (ECF No. 74). Instead, the attorney
5 vaguely declares that "[b]y searching the internet Plaintiffs have been able to locate a
6 variety of information about Defendants, including certain information they requested in
7 their Interrogatories and Requests for Production." *Id.* ¶ 3 (emphasis added).
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10 Conclusory declarations with no supporting details or evidence are entitled to no
11 weight. *See generally* *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1063 (9th
12 Cir. 2012) ("Conclusory, self-serving affidavits, lacking detailed facts and any supporting
13 evidence, are insufficient to create a genuine issue of material fact.") (internal quotation
14 marks, brackets and citation omitted). Plaintiffs' attorney's declaration does not establish
15 what he was allegedly able to find on the internet or – equally important – that it was
16 actually something that was sought in jurisdictional discovery that CXO sought to
17 designate as confidential (*e.g.*, revenue from a specific article, number of views of that
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1 article, location of viewers of the article). The reason is simple: Plaintiffs cannot find
2 such information on the internet.²

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4 In contrast to the conclusory declaration offered by Plaintiffs' attorney, which is
5 entitled to no weight, CXO offered the highly detailed declaration of its Vice President,
6 Matthew Smith, who provided factual details regarding not only the information at issue
7 and the measures that CXO takes to keep the information confidential, but the harm CXO
8 would suffer if Plaintiffs were able to spew it without any regulation. *See* Smith Decl.
9 (ECF No. 69-1) ¶¶ 3-5. As examples, Mr. Smith noted that the relevant employees'
10 computers are password-protected and restriction notices are used for these confidential
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13 ² Plaintiffs' counsel's conclusory, fact-bare statements are not limited to what he
14 allegedly found on the internet. He also states, with absolutely no details or evidence,
15 that the ROKSO database "is owned and operated by an ideologically opposed source
16 [whatever that means] located in the United Kingdom that regularly fails to verify its
17 facts prior to publication" Neta Decl. (ECF No. 74) ¶ 5. In contrast, CXO offered
18 proof that the **FBI** works with ROKSO's operator; ROKSO's operator has received an
19 award from the FBI-established, nonprofit National Cyber Forensics and Training
20 Alliance; and it has frequently been referenced in the media, including recently by the
21 Rachel Maddow Show. *See* Motion (ECF No. 69) at 4-5.
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1 documents. *Id.* ¶ 4. Further, Mr. Smith explained how CXO would be harmed. For
2 example, Mr. Smith explained that CXO's competitors could use the information to
3 obtain a "pricing advantage" as well as advantages in determining what strategies to
4 utilize. *Id.* He noted that this information was extremely valuable to CXO and would be
5 "valuable to CXO's competitors" because it contained "pricing" and "performance"
6 information. *Id.* ¶ 4. Mr. Smith went into detail about how CXO considers and treats
7 these documents as highly confidential. *See id.* ¶¶ 3-5.
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10 Plaintiffs argue that Mr. Smith does not "explain how a competitor learning of
11 CXO's pricing information—which a hypothetical competitor could access simply by
12 speaking with CXO's customers—would harm CXO." Opposition at 7. First, Plaintiffs
13 offer no evidence supporting their unsubstantiated assertion that a "hypothetical
14 competitor" could access CXO's detailed pricing information "simply by speaking with
15 CXO's customers." Second, Mr. Smith does in fact explain why CXO would be harmed
16 – it would provide CXO's competitors with a "pricing *advantage*,"³ which Plaintiffs
17 ignore. That is, competitors could undercut CXO's business with the advantage of
18 knowing pricing structure used by CXO.
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24 ³ Smith Decl. (ECF No. 69-1) ¶ 5 (emphasis added).

1 Plaintiffs also argue that Mr. Smith “fails to explain how information regarding
2 Defendants’ organizational structure and site traffic and revenue would reveal
3 ‘strategies.’” Opposition at 7. That is like saying that a fisherman who claims his fishing
4 routes and revenue-by-fish-type reveal his strategies has not sufficiently justified that
5 they reveal his strategies. “Site traffic,” “revenue,” and “organizational structure,” when
6 used in connection with an *online business*, necessarily reveal the online business’
7 strategies.
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9
10 Plaintiffs repeatedly cite *Beckman Industries, Inc. v. Intl. Ins. Co.*, 966 F.2d 470
11 (9th Cir. 1992), but that case is clearly distinguishable. That case involved a “blanket
12 protective order in 1986 keeping *all* discovery confidential.” *Id.* at 471 (emphasis
13 added). The proposed protective order here provides limited protection to only those
14 documents that qualify for protection and even then only if a party designates them. *See*
15 Proposed Order (ECF No. 69-2) at ¶¶ 2-3.
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17 In short, Plaintiffs have not rebutted the evidence offered by CXO establishing that
18 certain information sought by Plaintiffs is highly confidential and valuable to CXO and,
19 unless an order is in place governing its use, its unregulated disbursement by Plaintiffs
20 (who are world-renowned spam artists as established in the Motion) would result in great
21 harm to CXO. Because CXO has demonstrated good cause in the form of substantial
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1 harm it will suffer if its highly confidential, commercially-sensitive documents are not
2 protected, the Court should enter the proposed protective order.

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4 **B. Plaintiffs Do Not Argue, Much Less Show, That They Will Be Prejudiced By a Protective Order.**

5 In their Opposition, Plaintiffs simply ignore the cases cited by CXO establishing
6 that courts consider whether the party opposing a protective order has demonstrated any
7 prejudice resulting from a protective order. *See, e.g., Cabell v. Zorro Prods., Inc.*, 294
8 F.R.D. 604, 610 (W.D. Wash. 2013) (“Mr. Cabell has not established that restricting
9 disclosure of the designated confidential and commercially sensitive information to his
10 attorneys will prejudice his ability to demonstrate personal jurisdiction over
11 Defendant.”); *UCC Ueshima Coffee Co., Ltd. v. Tully's Coffee Corp.*, No. C06-1604RSL,
12 2007 WL 710092, at *2 (W.D. Wash. 2007) (noting non-moving party’s inability to
13 demonstrate that attorney’s eyes only designations would prejudice its case weighed in
14 favor of granting protective order).
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18 The reason Plaintiffs do not even broach the subject of any prejudice to Plaintiffs is
19 that Plaintiffs will not be prejudiced. Under the order, Plaintiffs can still use any
20 document in this case produced by CXO (or any other party). *See* Proposed Order (ECF
21 No. 69-2). The protective order simply outlines the manner in which Plaintiffs may use
22 the documents. Plaintiffs’ failure to even argue for, much less produce evidence
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1 demonstrating, prejudice resulting from a protective order is yet another reason the Court
2 should grant CXO's Motion.

3 **C. Plaintiffs Are Not Entitled to Expenses and Attorney's Fees.**

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5 Plaintiffs misquote Rule 37(a)(5). That Rule provides that if a motion to compel is
6 denied, reasonable expenses incurred in opposing the motion, including attorney's fees,
7 must be awarded unless "the motion was substantially justified or other circumstances
8 make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(B). Additionally, if the
9 motion is granted, a court must require payment of the movant's reasonable expenses
10 incurred in making the motion, including attorney's fees, unless either the movant filed
11 the motion before attempting in good faith to obtain disclosure, the opposing party's
12 nondisclosure was substantially justified, or other circumstances make an award of
13 expenses unjust. *See* Fed. R. Civ. P. 37(a)(5)(A).
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16 Here, CXO's Motion should be granted and the Motion is more than substantially
17 justified. CXO has offered a detailed Motion with a detailed declaration describing
18 exactly why CXO needs Court protection. CXO went out of its way to explain to
19 Plaintiffs' counsel, on more than one occasion, why protection was needed. Plaintiffs'
20 counsel could not logically explain why Plaintiffs were opposed to a protective order,
21 which would in no way hinder their ability to learn the relevant information or use it in
22 the case. Plaintiffs were the only parties to oppose the protective order. No co-defendant
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1 said they were opposed. Unfortunately, Plaintiffs saw this as a means to be contrarian
 2 and oppose anything and everything suggested. Indeed, Plaintiffs would not agree to *any*
 3 confidentiality designations, *despite Plaintiffs themselves designating numerous*
 4 *documents confidential*. CXO did not make Plaintiffs who they are or give them their
 5 history of nefarious conduct as set forth in the Motion. CXO discusses those facts
 6 because the need for protection is extremely heightened given the Plaintiffs' lurid history
 7 of spamming and other illegal conduct in derogation of the rights of others. If any
 8 expenses should be awarded, they should be awarded in favor of CXO.

11 Prayer

12 For the foregoing reasons, Defendant CXO Media, Inc. respectfully requests that
 13 the Court sign the proposed Protective Order attached to the Motion, and grant CXO such
 14 other relief to which it may be justly entitled.

15 Respectfully submitted this 25th day of January, 2018.

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1 I hereby certify that on January 25, 2018, I electronically filed the foregoing with
2 the Clerk of the Court using the CM/ECF System which will send notification of such
3 filing to the following:
4

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